KE SENG ENTERPRISE SDN BHD A

v.

LEMBAGA PEMBANGUNAN PERUMAHAN DAN BANDAR B

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL RAHMAN SEBLI JC
[SUIT NO: K21-11-2007]
1 MARCH 2010 C

CONTRACT: *Building contract - Termination - Failure by plaintiff to obtain approval for plans from relevant authorities - Construction of terms of agreement - Due diligence - Inordinate delay - Plaintiff's covenant to obtain approval for plans not conditional upon or subject to simultaneous performance by defendant of its covenants - Defendant's counterclaim for loss and damage proven on balance of probabilities* D

LAND LAW: *Housing developers - Building contract - Termination of agreement - Failure by plaintiff to obtain approval for plans from relevant authorities - Construction of terms of agreement - Due diligence - Inordinate delay - Plaintiff's covenant to obtain approval for plans not conditional upon or subject to simultaneous performance by defendant of its covenants - Defendant's counterclaim for loss and damage proven on balance of probabilities* E

In 1998, the plaintiff and the defendant entered into a privatisation agreement for a joint venture to construct double-storey shopbuildings, with the plaintiff being the sole and exclusive party to finance, construct and market the project. The project was to be carried out on a parcel of land for which the defendant had made an application. On 1 February 2005, the defendant terminated the agreement due to the plaintiff's failure to obtain the necessary approval for the relevant plans from the pertinent authorities, which resulted in the project being stalled. The plaintiff filed a claim for unlawful termination, contending that the defendant was not entitled to terminate the agreement as it had breached the owner's covenant by failing to extend said covenant which expired in 1996 *ie*, two years before the agreement was signed. The plaintiff also complained that the defendant failed to surrender the original issue title deed of the land to the plaintiff which rendered it impossible for the plaintiff to obtain the bridging loan facility needed to complete the project. The defendant, however, in filing its counterclaim for loss and damages against the F G H I

A plaintiff, submitted that the agreement was properly terminated as the plaintiff had repudiated the agreement by failing to obtain the necessary approval with all due diligence and within the stipulated time as covenanted in cl. 2(a) read with cl. 8(a) and (b) of the agreement.

B

Held (dismissing the plaintiff's claim, and allowing the defendant's counterclaim):

(1) Having regard to cls. 2(a) and 8(a)-(b) read with cl. 24 (time is of the essence) of the agreement, the plaintiff must perform its obligations with all due diligence and within the stipulated time irrespective of whether the defendant had performed its covenants or otherwise, unless it could be shown that the defendant's non-performance had undermined the due performance of the contract by the plaintiff, amounting to a fundamental breach. There was nothing in the agreement to infer that it was the parties' intention that the plaintiff's covenant to obtain approval for the relevant plans was conditional upon or subject to a simultaneous performance by the defendant of its covenants. It was clear, on the evidence, that the plaintiff had not acted with all due diligence to obtain the required approval from the relevant authorities. It was this factor, not the non-performance of the defendant's covenants, which led to the project's failure. (paras 19 & 20)

(2) It was not disputed that more than seven years had elapsed from the date of submission of the Development Plan by the plaintiff on 11 January 1997 to the date of the agreement's termination on 1 February 2005. Under the agreement, the plaintiff was required to submit and obtain approval for the plans within one month of the signing of the agreement. The seven-year delay was manifestly inordinate and was a clear manifestation of the plaintiff's intention not to be bound any longer by the agreement. It was a clear breach of the plaintiff's covenant to obtain the necessary approval "with all due diligence" under cl. 2(a) of the agreement. The delay was without justification and could not be condoned. (para 22)

(3) The delay by the plaintiff in implementing the project had caused the defendant loss and damage by depriving it of its entitlement under the Second Schedule of the agreement, based on the following evidence: (i) the plaintiff was supposed to complete the project in two phases over a period of six

years, commencing three months from the date of approval of the plans; and (ii) despite the seven-year lapse, the plaintiff had still not obtained approval of the plans in breach of cl. 2(a) of the agreement. The defendant's counterclaim was not a mere projection of profits but was based on actual fixed entitlements to payments as set out in the agreement's Second Schedule. Therefore, on the balance of probabilities, the counterclaim had been proved. (paras 25 & 26)

[Order accordingly.]

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Central Bank of India Ltd, Amritsar v. Hartford Fire Insurance Co Ltd AIR [1965] SC 1288 ***(refd)***

Kejutaan Holdings Sdn Bhd v. Magnum 4D (Perak) Sdn Bhd & Ors [2009] 6 CLJ 570 CA ***(refd)***

Nirwana Construction Sdn Bhd v. Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor [2008] 4 MLJ 157 ***(refd)***

North Eastern Railway Co v. Lord Hastings [1900] AC 260 ***(refd)***

For the plaintiff - Norbert Chin; M/s Norbert Chin & Co
For the defendant - Lim Pitt Kong; M/s PK Lim & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Rahman Sebli JC:

The Facts

[1] The plaintiff is a company incorporated in Malaysia under the Companies Act 1965. The defendant is a statutory body constituted under the Housing and Town Development Authority Enactment 1981.

[2] On 24 April 1998 the plaintiff and the defendant entered into a Privatisation Agreement ("the agreement") for a joint venture to construct 162 units of two double storey shopbuildings at Pekan Baru Kinarut South in the District of Papar, Sabah. The return from sales was projected to be RM44,224,400.

[3] Under the agreement the plaintiff was the sole and exclusive party to undertake the design, finance, construct, manage, market and sell the said project which was to be carried out on a parcel of land under Country Lease 025341940 which the defendant had applied for under Land Application No. 88020262. By letter dated 1 February 2005 the defendant terminated the agreement. The reason for termination was because the plaintiff failed to obtain from the relevant authorities the necessary approvals for the relevant plans. This has resulted in the stalling of the project.

Plaintiff's Case

[4] The plaintiff claims that the termination was unlawful as all the relevant plans had been approved by Majlis Daerah Papar and that all that the defendant needed to do was to surrender the issue title deed of CL025341940 to the plaintiff to be mortgaged for obtaining the bridging finance. It was claimed that the defendant neglected, refused and failed to do the same. It is the plaintiff's case that the refusal of the defendant to surrender the issue title deed of the said land to the plaintiff was the reason why the project could not proceed and not because it failed to obtain the plan approvals.

Defendant's Case

[5] The defendant on the other hand contended that the agreement was properly and lawfully terminated because the plaintiff had repudiated the agreement by failing to obtain the necessary approval for the relevant plans with all due diligence and within the stipulated time as covenanted in cl. 2(a) read with cl. 8(a) and (b) of the agreement. The two clauses are reproduced below.

[6] Clause 2(a)

> The Developer hereby covenants with the Authority as follows:
>
> (a) To prepare and submit the relevant plans to the Relevant Authorities for approval and to obtain such approval with all due diligence and for such purposes to engage and appoint at its own cost and expenses consultants which shall include architects, engineers, quantity surveyors and valuers and other professionals;

[7] Clause 8(a) And (b)

> 8(a) The Authority shall grant possession of the site of the said Project to the Developer within one (1) month from the date of signing of this Agreement and the Developer shall submit the relevant plans to the Relevant Authorities for approval within one (1) month of the date of the signing of this Agreement and the Developer shall be deemed to commence work on site within three (30 months from the date of approval of all the relevant plans.
>
> (b) Any re-submission(s) of the relevant plans required by the Relevant Authorities shall be re-submitted by the Developer within one (1) month from the date of the relevant letter from the relevant authority requiring so.

Whether Agreement Legally Terminated

[8] The question before the court simply is whether the agreement had been properly and legally terminated by the defendant and if so whether the defendant is entitled to the counterclaim. In essence the plaintiff's case is that it could not be faulted for failing to complete the project because its failure to obtain the approvals for the relevant plans was due to the defendant's fault.

[9] The plaintiff's covenants and obligations under the agreement are clear and unambiguous. It has been said often enough that when words of a written instrument are plain and unambiguous, it must be construed according to the plain and unambiguous language of the instrument: *North Eastern Railway Co v. Lord Hastings* [1900] AC 260.

[10] Where the language of the contract is clear and precise the court must give effect to the parties' intention: see *Central Bank of India Ltd, Amritsar v. Hartford Fire Insurance Co Ltd* AIR [1965] SC 1288 where the Supreme Court held:

> Now it is commonplace that it is the duty of the court to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

[11] Gopal Sri Ram FCJ spoke in a similar vein when he said in *Kejutaan Holdings Sdn Bhd v. Magnum 4D (Perak) Sdn Bhd & Ors* [2009] 6 CLJ 570 CA at p. 582:

> It is well-established principle sanctioned by the doctrine of sanctity of contract that parties who make agreements must adhere to their terms. The law does not permit excuse from performance save in very rare instances. There is no power in any court to interfere with contractual obligations lawfully established or to cancel obligations voluntarily assumed.

[12] In this connection, the events of default by the plaintiff are listed out in cl. 22 of the agreement. The relevant parts of the clause are the following:

> The following events shall constitute breach by the Developer:
>
> (a) If the Developer:
>
> (i) Shall not submit the relevant plans to the Relevant Authorities for approval within one (1) month from the date of signing of this Agreement.
>
> (ii) Shall not commence construction within three (3) months from the date of approval of all the relevant plans.
>
> …
>
> (e) if the Developer commits a breach of any conditions stipulated in this Agreement and fails to rectify the same within a period thirty (30) days from the date of a written notice of such breach being served on the Developer by the Authority;

[13] The words above are clear and unambiguous. The agreement then provides, also in clear terms, that in the event of any default by the plaintiff the defendant shall be entitled to terminate the agreement by giving one (1) month's notice in writing to the plaintiff.

[14] The plaintiff claims that the defendant was not entitled to terminate the agreement as the defendant on their part had breached the owner's covenant by failing to extend the owner's covenant which expired in 1996, ie, two years before the signing of the agreement. What the plaintiff is saying is that wrong + wrong = right. The owner's covenant is couched in the following terms:

To complete Before Month 01 of Year 1996 (Month January of Year One Thousand Nine Hundred and Ninety Six) The Construction On The Said Land Of A Building In Accordance With The Terms And Conditions Contained Herein And with the Plans And Specifications Submitted To And Approved By The Authority Under The Local Government Ordinance (And Town And Country Planning Ordinance) Having Jurisdiction Over The Said Land.

[15] In my view the plaintiff's contention is without substance. It is not a term nor can it be inferred from the agreement that the defendant as landowner had an obligation to extend the owner's covenants before the plaintiff is obligated to obtain the necessary approvals for the relevant plans. This is admitted by the plaintiff itself through Chan See Ket @ Chai Se Ket (PW1) under cross examination. The Q & A proceeded as follows:

Q: I put it to you that the extension to the owner's covenant is not a prerequisite nor is it a condition which must be satisfied by the defendant before the plaintiff applies for approval of all relevant plans from the Majlis Daerah Papar?

A: Yes.

[16] In the face of PW1's admission it is clear that the plaintiff's argument is a poor excuse for not obtaining the necessary approvals from the relevant authorities within the stipulated time.

[17] The plaintiff also complained that the defendant failed to surrender the original issue title deed to the plaintiff which made it impossible for the plaintiff to obtain the bridging loan facility needed to complete the project. The excuse is that the land title was necessary for the defendant to execute a 3rd party 1st legal charge over the said land. This complaint is also squashed by the plaintiff itself, also through PW1 when he admitted under cross examination that to proceed with the project the 3rd party 1st legal charge can be executed in escrow over the land where the project was to be carried out.

[18] There is nothing in the agreement requiring the defendant to give the land title to the plaintiff before the plaintiff is obligated to obtain approvals of the relevant plans from Majlis Daerah Papar. In any event according to Soudi Samy (DW3) who was the Executive Officer of Majlis Daerah Papar at the material time the Majlis Daerah Papar is not concerned with the owner's covenants

in the title as that is a matter under the jurisdiction of the Lands and Surveys Department. They only require a photostat copy of the land title as proof that the land exists and is within the jurisdiction of Majlis Daerah Papar.

[19] In my judgment, having regard to cls. 2(a) and 8(a)-(b) read with cl. 24 (time is of the essence) of the agreement, the plaintiff must perform its obligations with all due diligence and within the stipulated time irrespective of whether the defendant had performed its covenants or otherwise unless it can be shown that the defendant's non performance had undermined the due performance of the contract by the plaintiff amounting to a fundamental breach. There is nothing in the agreement to infer that it was the intention of the parties that the plaintiff's covenant to obtain approval for the relevant plans is conditional upon or subject to a simultaneous performance by the defendant of its covenants.

[20] On the evidence it is clear that the plaintiff had not acted with all due diligence to obtain the necessary approvals from the relevant authorities. It was this factor and not the non performance of the defendant's covenants that led to the failure of the project. The word 'diligence' is not defined in the agreement. In the *Concise Oxford English Dictionary*, 11th edn, Revised the word is defined as:

> careful and persistent work or effort.

[21] There were only two plans that required approval from the relevant authorities, namely the Development Plan and the Building Plan. According to DW3 these are the plans that required approval by Majlis Daerah Papar before the plaintiff could commence either earthworks or construction works on the site. He testified that it takes two years for Majlis Daerah Papar to approve all relevant plans – eight months on average to approve the Development Plan and six months on average to approve the Building Plan. He considers almost seven years to be too long to obtain approval of the plans before works could commence on site.

[22] It is not in dispute that from the date of the submission of the Development Plan by the plaintiff on 11 January 1997 to the date of termination of the agreement on 1 February 2005 more than seven years had elapsed. Under the agreement the plaintiff

was required to submit and obtain approval for the plans within one month of the signing of the agreement. This delay of more than seven years is manifestly inordinate and is a clear manifestation of the plaintiff's intention not to be bound by the agreement any longer. It is a clear breach of the plaintiff's covenant to obtain the necessary approvals "with all due diligence" under cl. 2(a) of the agreement. The delay is without justification and must not be condoned by the court. The plaintiff's claim was therefore dismissed with costs, to be taxed unless otherwise agreed.

Whether Counterclaim Proved

[23] The next issue is whether the defendant is entitled to counterclaim any loss and damage against the plaintiff for breaching the agreement. In *Nirwana Construction Sdn Bhd v. Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor* [2008] 4 MLJ 157 it was held by the Court of Appeal that once a breach of contract is established a plaintiff is entitled to recover damages. In the present case DW1 in his witness statement, which constitutes his evidence in chief testified as follows:

> Because of the termination of the said Privatisation Agreement dated 24.04.1998, I verily believe that LPPB has suffered loss and damage in the sum of RM2,696,197.32 (or any part thereof) based on Appendix A attached to the Defence and Counterclaim dated 15.06.2007 which contents I repeat herein verbatim as the basis of LPPB's Counterclaim for damages against the plaintiff herein. These damages represents LPPB's loss of future investment opportunity by being deprived of the use and benefit of LPPB's entitlement under the said Privatisation Agreement dated 24.04.1998 which the Plaintiff was supposed to have paid LPPB.

[24] This part of DW1's evidence was not challenged at all in cross examination. In the absence of evidence that the claim is inaccurate or that DW1 is an untruthful witness this means that the loss of future earnings resulting from the breach of the agreement could not be disputed at all and that the plaintiff tacitly accepts the claim to be cogent: *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639 CA.

[25] There can be no dispute that the delay by the plaintiff in implementing the project has caused loss and damage to the defendant by depriving the defendant of its entitlement under the Second Schedule of the agreement, based on the following evidence:

(a) The plaintiff was supposed to complete the project in two phases over a period of six years commencing three months from the date of approval of the relevant plans.

(b) Despite the lapse of a period of almost seven years, the plaintiff has still not obtained approval of the relevant plans from Majlis Daerah Papar in breach of cl. 2(a) of the agreement.

[26] The defendant's counterclaim is not mere profit projections or conjectures. The claim is based on actual fixed entitlement to payments as set out in the Second Schedule of the agreement. Therefore on the balance of probability it is my finding that the counterclaim has been proved. However, of the sum of RM2,696,197.32 claimed by the defendant it is appropriate in my view to deduct a reasonable percentage to take into account exigencies which may have an impact on the total counterclaim. For this reason I have awarded the defendant a global sum of RM2,000,000 only. Interest on the judgment sum was ordered to be at the rate of 8% per annum with effect from 2 March 2005 until the date of judgment and thereafter statutory interest thereon at the rate of 8% per annum from the date of judgment until the date of full payment.